U.S. Department of Labor

Office of Administrative Law Judges
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IN THE MATTER OF:	*	
John R. Moe	*	
Claimant	*	Case No.: 2000-LHC-1113
v.	*	OWCP No.: 1-131017
General Dynamics Corporation	*	
Employer/Self-Insurer	*	

APPEARANCES:

David N. Neusner, Esq.
For the Claimant

Mark W. Oberlatz, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on June 21, 2000 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an exhibit offered by the Employer. This decision is being

rendered after having given full consideration to the entire record which was closed on July 21, 2000, at which time the attorney fee petition was filed.

Stipulations and Issues

The parties stipulate (JX 1), and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On June 13, 1994, Claimant suffered bilateral injuries to the hands and arms in the course and scope of his employment.

4. Claimant gave the Employer notice of the injuries in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on July 26, 1999.

7. The applicable average weekly wage is $830.72.

8. The Employer voluntarily and without an award has paid temporary total compensation from September 6, 1996 through the present and continuing.

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. The date of his maximum medical improvement.

3. The applicability of Section 8(f) of the Act.

Summary of the Evidence

John R. Moe ("Claimant" herein), fifty-five 95) years of age, with an eleventh grade formal education and an employment history of manual labor, began working at the end of 1976 as a painter/ cleaner at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation (“Employer”), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. He used various tools, brushes and supplies to perform his assigned tasks all over the boats. He has sustained a number of injuries while working for

the Employer and these will be detailed below. He has been unable to work since September 6, 1996 because of his multiple medical problems. (CX 6)

Claimant's medical problems are best summarized by the March 6, 1998 report of Dr. Philo F. Willetts, Jr., an orthopedic surgeon, who states as follows in his report to the Employer (ALJ EX 4):

"I examined John Moe in my office today for multiple complaints. He stated that he had left greater than right hand pain and left greater than right shoulder pain, said to be of approximately five years' duration. Mr. Moe is a 52 year old right handed painter/cleaner at Electric Boat Corporation. History was somewhat difficult to elicit, and he had some considerable difficulty remembering even approximate dates and incidents. The history he did provide was as below.

"He said that he had been working for Electric Boat Corporation for approximately 18 years when he began noticing some bilateral hand and shoulder pain in approximately late 1993. He said that this was a slow onset and was not related to any one single traumatic event. He said that the symptoms persisted and increased, so that he reported them to the Yard Hospital in June, 1994.

"He said at the Yard Hospital, he was examined, advised of possible carpal tunnel syndrome, and referred to Dr. Wainright.

"He said that he saw Dr. Wainright approximately two weeks following his examination at the Yard Hospital in 1994. He said that Dr. Wainright brought him back for electrical testing in his office, treated him with splints and physical therapy, but with no change in his symptoms.

"He said that Dr. Wainright operated on each wrist on two occasions. He thought that Dr. Wainright operated on his left wrist to release a carpal tunnel and also to do something over the dorsum of the left wrist in about 1995. He said that, when he persisted in being, symptomatic, Dr. Wainright sent him to a doctor in Hartford. He said that Dr. Wainright subsequently performed a second dorsal wrist operation on the left. He said that Dr. Wainright also operated on his right hand with carpal tunnel release and a dorsal procedure and then did a second dorsal procedure in approximately 1997. Again, he was very unclear as to these dates.

"He said that he saw Dr. Giacchetto in 1995 for bilateral shoulder pain. He said there was no direct injury which produced the shoulder pain but he attributed it to the overhead work with his hands as well as climbing, lifting, and pulling over the

years. He said that Dr. Giacchetto obtained x-rays, sent him for additional tests, and told him of rotator cuff tendonitis. He said that Dr. Giacchetto gave him a steroid injection to his shoulder but that he, Mr. Moe, sustained an allergic reaction to this. He said that he was also sent for therapy. He said that Dr. Giacchetto operated on his right shoulder in about 1996. He said that, postoperatively, it took a long while, but he eventually began to feel better with the right shoulder.

“He said that he also was sent to Dr. Bernstein in approximately 1996, underwent x-rays, nerve testing, and was told that he needed more surgery. History was again very unclear here.

“He said that he also saw Dr. Racy at the Norwich Neurology Group, approximately the summer of 1997. He said that he was told there was a problem with the nerve going to the right small and ring fingers but said he was unclear as to the diagnosis.

“He said that sometime during this time period, he also saw Dr. Ashmead in Hartford. He said he underwent nerve testing, and said that Dr. Ashmead operated on his left u1nar nerve at the elbow in 1997. He said symptoms from that operation were improving.

“He said that he last saw Dr. Wainright approximately two weeks prior to this examination and will next see him if needed. He said that he last saw Dr. Ashmead four months prior to this examination and will next see him on April 8, 1998, for right elbow ulnar nerve surgery. He said that he last saw Dr. Giacchetto one month prior to this examination and will next see him as needed. He said that Dr. Giacclietto advised him to wait and see how his left shoulder does and has not recommended left shoulder surgery.

“He said that, currently, he treats with a heating pad, exercises, and takes Advil or Tylenol three times per day.

“He said that his left hand was unchanged in symptoms with no overall improvement. He said that his right hand had improved from an original symptom level of 10 to a current level of 8 (with 0 being no symptoms at all). He said that his right shoulder had improved from an original symptom level of 10 to a current level of 4. He said that his left shoulder had improved from an original symptom level of 10 to a current level of 7. He said that he reached maximum medical improvement of his right shoulder about six months after the surgery. He said that he did not know when he reached maximum medical improvement with the rest of his conditions. He said that he was still improving with respect to the left elbow,” according to the doctor.

Dr. Willetts, after reviewing Claimant's diagnostic tests, his medical records and after the physical examination, concluded as follows (**Id.**):

"DIAGNOSIS:

1. Status post release, carpal tunnel syndromes, both hands with some residual complaints and symptoms.

2. Status post surgical fusions for scapholunate disassociation with some residual complaints and symptoms.

3. Status post left u1nar nerve release at elbow, with some improvement but some ongoing complaints and symptoms of u1nar numbness.

4. Right ulnar neuropathy at cubital tunnel.

5. Status post decompression of chronic impingement, right shoulder with some residual complaints and symptoms.

6. Complaints, symptoms, and signs of left shoulder impingement.

7. Possible underlying arthritic condition.

8. Chronic hearing loss bilaterally.

9. Chronic obesity.

"DISCUSSION: I will try to respond to your questions in order as follows:

1. Is he currently disabled due to this injury and is it the sole cause of his disability?

Mr. Moe is substantially disabled of a result of the conditions reported in June, 1994. His Electric Boat injury is not the sole cause of these conditions, however, for the following reasons.

He worked with grinding machines, burriers, and as a forklift operator for nine years at Lafayette Grinding in Brooklyn, New York. He also was noted to have scapholunate disassociation, which is most frequently associated with direct trauma (which he denied having at Electric Boat Corporation) rather than repetitive exposure. He has had some documented hearing loss for ten years. The diffuse nature of his arthritis changes also suggest there may be an underlying arthritic or inflammatory condition unrelated to any work activities. Thus, no incident on or about, or leading up to, June 13, 1994, was the sole cause of his disability.

2. If so, is he totally disabled or may he perform selected work?

Mr. Moe is substantially disabled. He could perform light and sedentary selected work, however.

3. If capable of light work, what restrictions would you place on him?

He should avoid repetitive use of his hand, avoid using vibratory tools, avoid using his hands above the shoulder, avoid lifting more than 15 pounds, and avoid lifting above the shoulder at all. He should avoid pushing and pulling more than 25 pounds. He should avoid climbing ladders or crawling. He could otherwise sit, stand, walk, and drive, and climb and descend stairs. He could do light delivery, could do dispatch work, and similar sedentary activities.

4. Has he reached a point of maximum medical improvement?

He has reached maximum medical improvement with respect to his shoulders and with respect to his hands. He has not reached maximum medical improvement with respect to his u1nar neuropathies at the elbows.

5. If so, when?

I believe he reached maximum medical improvement with respect to the right shoulder one year after surgery, or January, 1997. He reached maximum medical improvement with respect to each hand six months following the most recent surgeries to each hand or in March, 1997, with respect to the right hand and August, 1997, with respect to the left hand.

6. If so, what percentage of permanent functional loss of use pursuant to the fourth edition of the AMA guidelines does he have due to this condition? Please apportion the impairment specific to the injury and the impairment attributable to the pre-existing conditions or factors.

"RIGHT SHOULDER: Based upon decompression of the right shoulder with surgical resection of the distal clavicle and using Table 27 on page 61 of the AMA **Guides**, there is a 10% permanent partial physical impairment of the right upper extremity.

> **APPORTIONMENT:** Mr. Moe was noted to have a congenitally curved hooked acromion, a condition that contributes to shoulder impingement. There was no one specific traumatic event sustained at work. Assuming that the repetitive stresses to his shoulders contributed to his impingement, then of the many years

worked grinding and doing repetitive upper extremity motions, eighteen years, or two-thirds of the work activities at Electric Boat and nine years of grinding, burning, and forklift operation at Lafayette Grinding in Brooklyn would have contributed to the impingement. Thus, of the 10% permanent partial physical impairment of the right upper extremity, 1% could fairly be apportioned to the congenital abnormality of the hooked acromion. Of the remaining 9 %, 3 % would have been the result of preexisting activities prior to work for Electric Boat Corporation and 6% permanent partial physical impairment of the right upper extremity could fairly be apportioned to the repetitive activities of the right shoulder at work at Electric Boat Corporation over the years.

“LEFT SHOULDER: Based upon limited flexion and extension of the left shoulder, and using Figure 38 on page 43 of the AMA **Guides**, there is a 3% pennanent partial physical impairment of the left upper extremity.

Based upon limited abduction and adduction of the left shoulder, and using Figure 41 on page 44 of the AMA **Guides**, there is a 4% permanent partial physical impairment of the left upper extremity. There is no additional impairment based on rotation which is within normal limits. These impairments total 7% permanent partial physical impairment of the left upper extremity with respect to the left shoulder.

APPORTIONMENT: It is of interest that there were no complaints documented in the medical records with respect to the left shoulder between Dr. Wainright's initial note of June 20, 1994, that described tenderness over the greater tuberosities (plural), until Dr. Giacchetto's note of January 16, 1998, stating that Mr. Moe reported having left shoulder pain all along. Thus, there did not appear to be any significant left shoulder symptoms (despite Mr. Moe's repeated and effective complaints of various upper extremity regions over the years, until January 16, 1998, almost two and one-half years following Mr. Moe's last work activities. It is difficult to attribute any significant amount of impairment of the left shoulder to work activities between 1976 and 1995 considering the paucity of recorded symptoms in the area. There appears to be a significant spontaneous and ongoing degenerative process in Mr. Moe, and this could well explain much of his other complaints as well. In my opinion, of the 7% left upper extremity impairment, 3% could fairly be apportioned to his work activities over the years and the remainder would be

apportioned to previous work and non-occupational factors.

“**RIGHT ULNAR NEUROPATHY:** Based upon electrical diagnostic evidence of right u1nar neuropathy at the elbow, with respect to a normal physical and neurological examination of the u1nar nerve, and using Table 16 on page 57 of the AMA **Guides**, there is a 6% permanent partial physical impairment of the right upper extremity.

APPORTIONMENT: Accepting the cumulative nature of the ulnar neuropathy over the years, 2% permanent partial physical impairment of the right upper extremity based on the u1nar neuropathy preexisted Mr. Moe's work at Electric Boat Corporation and 4% permanent partial physical impairment of the right upper extremity could fairly be apportioned to the nature of his work at Electric Boat Corporation over the years.

“LEFT ULNAR NEUROPATHY: Similarly, based upon a released left nerve at the elbow, and using the same tables and pages of the Fourth Edition AMA **Guides**, there is a 3% permanent partial physical impairment of the left upper extremity.

APPORTIONMENT: Using the same reasoning, 1% permanent partial physical impairment of the left upper extremity would be the result of preexisting factors, and 2% permanent partial physical impairment of the left upper extremity could fairly be apportioned to his work activities over the years at Electric Boat Corporation.

“RIGHT HAND:

CARPAL TUNNEL: Based upon a released right carpal tunnel syndrome, with a slightly prolonged two point discrimination of 7 millimeters over the index finger, but otherwise normal neurological examination, there is a 5% permanent partial physical impairment of the right hand using Table 16 on page 57 and Table 2 on page 19.

APPORTIONMENT: Based upon the contributing factors of previous nine years work in Brooklyn, and his obesity, of the 5% right hand impairment, 2% was preexisting and 3% permanent partial physical impairment is apportioned to his Electric Boat Corporation activities over the years.

STATUS POST RIGHT WRIST FUSION: Based upon limited motion of the right wrist, and specifically with respect to limited flexion and extension, there is a 16% permanent

partial physical impairment of the left upper extremity. Based upon limited right wrist radial deviation, there is no impairment. Based upon limited right wrist u1nar deviation, there is another 4% impairment of the right upper extremity. Adding these two impairments, totals 20% right upper extremity impairment based upon status post fusion with limited motion. Using Table 2 on page 19, the 20% upper extremity impairment is equivalent to 22% permanent partial physical impairment of the right hand.

APPORTIONMENT: I agree with Drs. Kelly, Bernstein, and Ashmead that the scapholunate disassociation, for which the scapholunate surgery was ultimately done, was probably substantially preexisting. Probably, the work activities over the years contributed to its symptomatology however. It is noted that his work activities included nine years of forklift operation, grinding, and burning in Brooklyn, New York, before working another eighteen years at Electric Boat Corporation. Thus, of the 22% permanent partial physical impairment of the right hand, 12% very probably preexisted his work at Electric Boat Corporation, and if the history be correct, 10% permanent partial physical impairment of the right hand could fairly be apportioned to the activities leading up to June, 1994.

“LEFT HAND:

LEFT CARPAL TUNNEL SYNDROME: Similar to above, based upon status post release of the left carpal tunnel syndrome with normal neurological examination, and using Table 16 on page 57 and Table 2 on page 19, there is a 3% permanent partial physical impairment of the left hand.

APPORTIONMENT: Using the same reasoning, and with respect to doing grinding, burning, and forklift operation in Brooklyn, New York for nine years prior to his employment at Electric Boat Corporation, 1% permanent partial physical impairment of the left upper extremity could fairly be apportioned to preexisting and the remaining 2% permanent partial physical impairment of the left hand would be fairly apportioned to the work activities performed at Electric Boat Corporation.

STATUS POST LEFT WRIST FUSION: Based upon limited left wrist flexion and extension, and using the same Figure 26 on page 36 of the AMA **Guides**, there is a 16% permanent partial physical impairment of the left upper extremity. Similarly, based upon limited radial and ulnar deviation,

and using Figure 29 on page 38 of the AMA **Guides**, there is another 7% permanent partial physical impairment of the left upper extremity. These impairments total 23% of the left upper extremity. Using Table 2 on page 19 of the AMA **Guides**, 23% upper extremity impairment is equivalent to 26% permanent partial physical impairment of the left hand based upon status post wrist fusion for scapholunate disassociation and subsequent degeneration.

APPORTIONMENT: Using the same rationale, of the 26% permanent partial physical impairment of the left hand, 14% permanent partial physical impairment preexisted Mr. Moe's employment at Electric Boat Corporation, and, if the above history be correct, 12% permanent partial physical impairment of the left hand could fairly be apportioned to the contribution of the repetitive work activities done at Electric Boat Corporation over the years.

The diffuse nature of Mr. Moe's multiple complaints, some of which have clearly persisted and progressed long past the time of his employment, are somewhat perplexing. There is no evidence, in the above records reviewed, that he has ever undergone testing for underlying systemic arthritis. For completeness, this testing should be done. If there were to be positive tests for underlying arthritic disease, the impairments apportioned to his occupational activities would be significantly reduced.

“7. Is his injury of 6/13/94 causally related to his employment at Electric Boat Corporation?

“I believe that his conditions reported on June 13, 1994, were at least partially related to, or contributed to, by his employment, at Electric Boat Corporation.

“8. Did he have any previous condition or injury which would combine with this injury to make his present injury materially and substantially greater?

“Yes. Mr. Moe has had a hearing loss documented as long as ten years ago in regular annual check-ups by Electric Boat Corporation. In addition, his cumulative activities long preexisted his employment at Electric Boat Corporation. In addition, I would agree with Drs. Kelly, Ashmead, and Bernstein that the scapholunate disassociations were very probably substantially preexisting. Thus, his previous conditions and injuries, when combined with the injuries reported June 13, 1994, did produce materially and substantially greater injury than what would have been produced by any incidents on or about, or leading up to, June 13, 1994, alone.

“9. Could you ask the claimant if he has worked in any capacity since his injury? VWlat physical activity does he engage in?

“He stated that other than working at Electric Boat itself, he had not worked at all or in any capacity since June 13, 1994.

“Currently, he said that he did a little housework, shopped and ran errands one hour per day, did a hobby of citizens band radio five hours per day, visited friends three hours per day, read two hours per day, and watched television six hours per day,” according to the doctor.

Also noteworthy is the October 31, 1997 report of Dr. John J. Giacchetto, Claimant’s treating physician, wherein the doctor states as follows (CX 3):

> “Followup for work related right shoulder problem. He is almost two years status post subacromial decompression, right shoulder, with distal clavicle excision. He has done well as a result of that surgery. He still has some low grade discomfort over the anterior shoulder with exertional activity. His passive range of motion is near full. Actively he has about 110 degrees of elevation, 60 degrees of abduction and internally rotates to L3. Rotator cuff testing is strong within the available range of motion. There (are) no impingement signs.
>
> **“IMPRESSION:** Post traumatic impingement syndrome, right shoulder, secondary to work related condition. He has reached maximum medical improvement. He carries a permanent loss of 13% of-the right upper extremity as a result of this condition.
>
> “Of note is that John has had multiple wrist operations as well as recent left cubital tunnel decompression, also as a result of work related upper extremity conditions. Any additional impairment to the extremities for these conditions will be in addition to the aforementioned loss of his right upper extremity for the shoulder condition. His other treating surgeons will provide the appropriate impairment determinations.
>
> “Relative to the right shoulder he is subject to permanent work restrictions. Followup is scheduled here as needed,” according to the doctor.

Claimant was also examined by Dr. Thomas J. Godar, a noted pulmonary specialist, and the doctor, after the usual social and employment history, his review of Claimant’s medical records and

his diagnostic tests and the physical examination, concluded as follows in his May 14, 1998 report (ALJ EX 4):

"IMPRESSIONS:

1. Morbid obesity with obstructive sleep apnea syndrome, partially corrected by nasal CPAP without clear evidence for cardiac failure, manifested by mild restriction on pulmonary function tests.

2. Mild airway obstruction with a reversible component by history, under treatment, controlled, due to multiple etiologic factors.

3. Gastroesophageal reflux disease, associated with obesity and contributing to airway hyperreactivity.

4. Essential hypertension, under treatment, controlled, compensated.

5. Hypercholesterolemia by history, under treatment.

6. Bilateral hearing loss, not further evaluated.

7. Status post surgical correction for bilateral carpal tunnel syndrome, elbow nerve injury and right rotator cuff injury.

"COMMENTS AND RECOMMENDATIONS: There are several reasons that Mr. Moe has some functional impairment of the respiratory system, a major one being the presence of restrictive disease due to obesity with obesity further causing an increase in oxygen requirement and further aggravating the sense of dyspnea on exertion. In spite of this he has a relatively good exercise tolerance.

He does have airway obstruction in the absence of personal cigarette smoking although he was exposed to 2 parents who were heavy smokers during his childhood. This would increase the risk of his developing asthma as an adult. In addition his asthma is contributed to by gastroesophageal reflux disease with aspiration contributing to cough, wheeze and sputum production during the night.

"I agree with Dr. Bundy that it seems likely the patient had underlying hyperreactive airway disease that long preceded any exposure to workplace irritants that could have caused asthma. I believe the workplace irritants did cause temporary aggravation of preexisting hyperreactive airway disease and therefore the workplace exposures were a factor in causing symptoms at the time of employment. I do not believe at the

present time there is any evidence for residual injury from those exposures. The extent to which the patient's fractured nose and nasal obstruction was a factor in contributing to both sleep apnea and his asthma is unclear. The patient has other major problems in that he has failed to lose weight, is relying solely on nasal CPAP to control the potential hazards of the obstructive sleep apnea syndrome, is known to be hypertensive, essential hypertension being very much contributed to by obstructive sleep apnea, the latter occasionally the cause for systemic hypertension. In the absence of weight loss the major modality for improvement has not been utilized.

"I believe his failure to lose weight has caused him to have some limitation in exercise tolerance as a consequence both of the restrictive effect of obesity which is clearly manifested in his pulmonary function tests in addition to the increase oxygen requirements of the increased tissue mass contributing to dyspnea at any pulmonary function level.

"One thing is certain, the patient has no evidence for asbestos associated pathology, either involving the pleura or the lung.

"Using reasonable medical judgment and the AMA **Guide to the Evaluation of Respiratory Impairment**, 4th Edition 1993, I would ascribe the patient a respiratory impairment of 30%, with 15% due to restriction of lung volumes secondary to obesity and potentially reversible, 15% due to obstructive airway disease with significant treated bronchial asthma. I believe of the 15% half of the causation could be ascribed to his exposure to heavy cigarette smoke as a child in the household in conjunction with preexisting hyperreactive airways with the manifestation of asthma associated with workplace exposures to paints, epoxy rosins, welding and grinding fumes. It seems clear that his gastroesophageal reflux disease which demonstrated aspiration is a contributor to his asthma but I am not certain of what proportionality to assign it at this time with this gastroesophageal reflux disease symptoms controlled on medication.

"It is clear the patient's impairment for employment is more based on his orthopedic problems than his respiratory impairment but I would certainly agree with the anticipated response to removal from the workplace manifested in the letters of Dr. Bundy.

"The patient has not reached maximum medical improvement since there would be substantial improvement in his function if he lost weight, that requiring at least 100 lb below his current weight. In other respects he has been relatively stable in the last year and would otherwise have reached maximum medical improvement with the exception of the substantial factor of

obesity induced restriction and the role it may be playing in destabilizing his reactive airway disease.

"It is clear that there were preexisting conditions including his underlying hyperreactivity, his long exposure to cigarette smoke as a child, and his many years of obesity with gastroesophageal reflux disease that have contributed to his current impairment/disability thus rendering his present disability materially and substantially greater than it would have been had he had the workplace exposures alone. It is also very clear that his present disability can not be solely the result of his alleged workplace exposures," according to the doctor.

On the basis of the totality of this closed record[1], I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd**

[1]As the Employer has accepted this claim and as the parties preserved Claimant's testimony by deposition (CX 6), Claimant was excused from the hearing in view of his multiple medical problems.

Shipyards, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry**

Dock, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his bilateral hand/arm problems, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is

liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant’s repetitive use of his tools over the years has resulted in bilateral hand/arm problems, diagnosed as bilateral carpal tunnel syndrome, that such condition constitutes a work-related injury, that the date of injury is June 13, 1994, that the Employer had timely notice of such injury, has authorized appropriate benefits while he has been unable to return to work and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant’s injury, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975).

Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a painter/cleaner. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and

is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v.**

Universal Maritime Service Corp., 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on March 5, 1998 and that he has been permanently and totally disabled from March 6, 1998, according to the well-reasoned opinion of Dr. Giacchetto. (CX 3)

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer

appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer has accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits to Claimant while he has been unable to return to work. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injuries. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berkstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (19982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir.

1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked for the Employer since 1976, (2) that he has sustained previous work-related industrial accidents prior to June 13, 1994, (3) while working at the Employer's shipyard and (4) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability (**i.e.,** his above-identified multiple medical problems, such as his bilateral shoulder problems, his hyperactive airways obstructive/restrictive disease, his obstructive sleep apnea, his gastroesophageal reflux which was aggravated and exacerbated by his daily exposures to welding smoke, paint fumes, grinding

dust and other injurious pulmonary/respiratory stimuli) and his June 13, 1994 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Willetts (ALJ EX 4, Dr. Giacchetto (CX 3 and Dr. Godar (ALJ Ex 4). **See Atlantic & Gulf Stevedores v. Director**, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final injury on June 13, 1994, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer. Claimant's attorney filed a fee application on July 21, 2000 (CX 7), concerning services rendered and costs incurred in representing Claimant between February 7, 2000 and July 6, 2000. Attorney Stephen C. Embry seeks a fee of $2,223.75 (including expenses) based on 8.75 hours of attorney time at $200.00 per hour and 7.25 hours of paralegal time at $64.00 per hour.

The Employer has accepted to the requested attorney's fee as reasonable in view of the benefits obtained and the hourly rates charged. (RX 1)

In accordance with established practice, I will consider only those services rendered and costs incurred after the

informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $2,223.75 (including expenses of $9.75) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Commencing on March 6, 1998, and continuing thereafter for 104 weeks, the Employer as a self-insurer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $830.73, such compensation to be computed in accordance with Section 8(a) of the Act.

2. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his June 13, 1994 injury on and after March 6, 1998. The Employer shall also receive a refund, with appropriate interest, of all overpayments of compensation made to Claimant herein.

4. Interest shall be paid by the Employer and Special Fund on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-

related injury referenced herein may require, even after the time period specified in the Order provision above, subject to the provisions of Section 7 of the Act.

6. The Employer shall pay to Claimant's attorney, Stephen C. Embry, the sum of $2,223.75 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between February 7, 2000 and July 6, 2000.

DAVID W. DI NARDI
Administrative Law Judge

Dated: December 12, 2000
Boston, Massachusetts
DWD:dr